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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1977

No. 77-156

MILGO ELECTRONIC CORPORATION AND  
INTERNATIONAL COMMUNICATIONS  
CORPORATION,

*Petitioners,*

*vs.*

CODEX CORPORATION AND  
YELLOW FREIGHT SYSTEM, INC.,

*Respondents.*

**BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

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## TABLE OF CONTENTS

	<i>Page</i>
Question Presented .....	1
Statement of the Case .....	2
Argument .....	4
The Court of Appeals Imposed No "Rigid . . . Rule"	4
Venue Is a Factor .....	5
The Real Party in Interest Factor .....	8
That Two Inconvenient Actions Were Brought Rather Than One Does Not Tip the Balance .....	10
"Disqualification" .....	12
There Is No Conflict with Kerotest .....	12
Improper Motive a Factor .....	13
Independent Ground .....	14
Conclusion .....	14

## TABLE OF AUTHORITIES CITED

<i>Cases</i>	<i>Page</i>
<i>Advance Transformer Co. v. Bromberg</i> , 106 F.Supp. 691 (N.D. Ill. 1952) .....	9
<i>American Chemical Paint Co. v. Thompson Chemical Corp.</i> , 244 F.2d 64 (9 Cir. 1957) .....	9
<i>Arkay Infants Wear, Inc. v. Kline's, Inc.</i> , 98 F.Supp. 862 (W.D. Mo. 1950) .....	9
<i>Joseph Bancroft &amp; Sons Co. v. Spunize Co. of America</i> , 268 F.2d 522 (2 Cir. 1959) .....	10
<i>Cresta Blanca Wine Co., Inc. v. Eastern Wine Corp.</i> , 143 F.2d 1012 (2 Cir. 1944) .....	10
<i>Fourco Glass Co. v. Transmirra Corp.</i> , 353 U.S. 222 (1957) .....	6
<i>General Tire &amp; Rubber Co. v. Isocyanate Products, Inc.</i> , 270 F.Supp. 868 (D. Del. 1967), aff'd per curiam 391 F.2d 936 (3 Cir. 1968), cert. den'd 393 U.S. 842 (1968) .....	9
<i>William Gluckin &amp; Co. v. International Playtex Corp.</i> , 407 F.2d 177 (2 Cir. 1969) .....	8
<i>Hook v. Hook &amp; Ackerman, Inc.</i> , 101 F.Supp. 81 (W.D. Pa. 1951), on reh., 103 F.Supp. 790 (W.D. Pa. 1952), aff'd per curiam 201 F.2d 512 (3 Cir. 1953) .....	9
<i>Gordon Johnson Co. v. Hunt</i> , 101 F.Supp. 536 (N.D. Ohio 1951) .....	9
<i>Kerotest Mfg. Co. v. C-O-Two Co.</i> , 342 U.S. 180 (1952) ..	9, 12, 13
<i>Minnesota Mining &amp; Manufacturing Co. v. Polychrome Corp.</i> , 267 F.2d 772 (7 Cir. 1959) .....	9
<i>The Monrosa v. Carbon Black, Inc.</i> , 359 U.S. 180 (1959) ..	14
<i>Rayco Mfg. Co. v. Chicopee Mfg. Corp.</i> , 148 F.Supp. 588 (S.D. N.Y. 1957) .....	10
<i>Schnell v. Peter Eckrich &amp; Sons</i> , 365 U.S. 260 (1961) ....	6

	<i>Page</i>
<i>Stonite Co. v. Melvin Lloyd Co.</i> , 315 U.S. 561 (1942) .....	6
<i>Sundstrand Corp. v. American Brake Shoe Co.</i> , 315 F.2d 273 (7 Cir. 1963) .....	8
<i>Triangle C. &amp; C. Co. v. National Electronic Products Corp.</i> , 138 F.2d 46 (3 Cir. 1943), cert. den'd 320 U.S. 784 (1943) .....	9, 10
<i>Turbo Machine Co. v. Proctor &amp; Schwartz, Inc.</i> , 204 F.Supp. 39 (E.D. Pa. 1962) .....	10
<i>Yale &amp; Towne Mfg. Co. v. Manning, Maxwell &amp; Moore</i> , 91 F.Supp. 106 (S.D. N.Y. 1950) .....	9

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**BRIEF IN OPPOSITION TO  
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**QUESTION PRESENTED**

Was it not proper in this manufacturer's declaratory judgment action in Boston, to enjoin the patentee's customer patent infringement action in Kansas City, brought for the purpose of having the Boston manufacturer defend in Kansas City where venue for a patent infringement action against the Boston manufacturer was lacking, when both real parties in interest are East Coast companies (a



Boston manufacturer and a Miami patentee), and all the issues between these real parties in interest are present in Boston but not in Kansas City — even though the patentee has sought to bootstrap his position by bringing a second fundamentally inconvenient action, with a fraction only of common issues, in Kansas City (in which city, in an earlier unreviewed action against yet a third party, one of the four patents here in question was adjudicated in connection with products unlike those here in issue)?

### STATEMENT OF THE CASE

Respondent Codex Corporation ("Codex") is a Massachusetts manufacturer of modems, electronic devices to send computer information over telephone wires. Petitioner Milgo Electronic Corporation ("Milgo") is a Florida manufacturer of competing modems. Petitioner Yellow Freight System, Inc. ("Yellow Freight") is Codex's Kansas customer. Petitioner International Communications Corporation ("ICC") is Milgo's wholly owned Florida distribution subsidiary.

On January 13, 1976, Senior Judge Templar in Kansas signed findings and conclusions that three Milgo modem patents were valid and infringed by modems manufactured by a third competitor. These findings closely paralleled those proposed by Milgo. This action (the "UBC" action) had been pending over four years.

Ten days later Milgo brought an action in Kansas against Yellow Freight, as Codex's Kansas customer, for infringement of one of those modem patents and of two other Milgo modem patents. Codex has no place of business in Kansas. Far less than all the issues between Milgo and

Codex on these same patents exist even formally between Milgo and Yellow Freight.<sup>1</sup>

On the same day that it brought the action against Codex's Kansas customer, Milgo also filed an action in Kansas against American Telephone & Telegraph Company and its wholly owned subsidiary Western Electric Company, Inc. (collectively, "A.T.&T."), as well as against A.T.&T.'s Kansas customers, Boeing Computer Services, Inc. and Southwestern Bell Telephone Company, for infringement of four Milgo modem patents, one of which is not involved in the Yellow Freight action. (Although, incredibly, Milgo later took fourteen depositions aimed at showing that A.T.&T. had relevantly knowledgeable witnesses closer than the East Coast, in the end it had to abandon any real contention so.)

Codex then filed the present action, in its home forum, for declaratory judgment that Milgo's (first three, then by amendment four) modem patents asserted against it through Milgo's cat's paw use of Yellow Freight were invalid and not infringed, and moved simultaneously that the Yellow Freight customer action in Kansas be enjoined. Milgo moved, inter alia, that this Boston action be stayed in favor of its Kansas customer action. The District Court resolved the forum issue by staying this Boston action.

On the same day that District Judge Skinner signed the stay just mentioned (July 23, 1976), District Judge O'Con-

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<sup>1</sup> Milgo shortly later sought to add a fourth of its modem patents in the Kansas action against Yellow Freight. This patent had not been involved in the UBC action.

Only one of the four modem patents in the Yellow Freight action was involved in the UBC action, as noted, and that as applied against different devices raising different issues of infringement.

nor in Kansas City denied A.T.&T.'s motion for transfer to New York City (with severance and stay as to its customers) — from the bench, without a written ruling.

The Court of Appeals for the First Circuit, in a careful opinion, reversed (Pet. App. A).

### ARGUMENT

The "Questions Presented" (Petition, p. 2 — hereinafter, "Pet. 2") are not actually presented. All the Court of Appeals held was that substantial weight should be given the patent venue statute in deciding whether to force a manufacturer to defend (through giving a customer action there priority) in a forum in which the venue statute precluded the manufacturer's being named as a defendant. There is no conflict with any decision of this or any other Court, and no reason of public policy calling for grant of certiorari with respect to this interlocutory conclusion, which comports with common sense and an elementary sense of fair play.

#### *The Court of Appeals Imposed No "Rigid . . . Rule"*

To give substantial weight to the applicable venue statute in weighing where litigation between parties should go forward<sup>2</sup> is not to impose a "rigid . . . rule", as asserted in Petitioners' Question 1 (Pet. 2). The District Court, in

<sup>2</sup> In the Court's words, Pet. App. A, p. 6:

"In these circumstances, while we do not say that there should be an inflexible rule, we would recognize a rebuttable presumption that a manufacturer's declaratory judgment action, in its home forum, at least if brought no later than promptly after a customer action, should take precedence over a mere customer action in a jurisdiction in which the manufacturer could not be sued."

ignoring this factor altogether (Pet. App. B; Pet. App. A, p. 6) fell into error as a matter of law; plainly, this factor at least bears on those interests of justice which should be considered in determining which of two actions should go forward first.

Furthermore, what should be given weight was not just the manufacturer's residence (as Petitioners assert, Question 1, Pet. 2), but whether venue against the manufacturer would have been proper. By the very terms of the statute, this includes also wherever the manufacturer has "committed acts of infringement and has a regular and established place of business" (Pet. 3). The larger the manufacturer, the greater the number of places it can usually be reached.

What Petitioners seek to do is to abort this venue statute, and de facto make possible suing a manufacturer anywhere it has a customer. For, as the Court of Appeals found (Pet. App. A, p. 5):

"Obviously, if Yellow Freight is to be tried in Kansas, and then Codex in Boston, there will be no judicial economy, but rather, judicial duplication. Regardless of what Milgo would contend, it seems to us only too clear that the district court's decision effectively compels Codex to renounce its right not to be sued in a forum where it could not have been sued for infringement, 28 U.S.C. § 1400(b) . . . ."

And this venue statute is an important one.

#### *Venue Is a Factor*

It would seem too plain for statement that one factor at least bearing on whether a manufacturer should be forced to litigate its right in a forum is whether the applicable venue statute would permit its being sued there.



As the Court of Appeals said (Pet. App. A, p. 6):

"Venue rights, contrary, perhaps, to the view of the district court, which did not mention them at all, are important, particularly in patent litigation, *see Schnell v. Peter Eckrich & Sons, Inc.*, ante, 365 U.S. at 262 n. 4. . . ."

Petitioners seek, despite recognition that the patent venue statute is the one most pertinent on their petition (Pet. 3), to sweep it altogether under the rug as a relevant consideration, mentioning it only cursorily (Pet. 21-22), and not including in their statement of the case the important circumstance that Codex has no place of business in Kansas.

No less than three of this Court's opinions emphasize its importance, and that it should be strictly construed: *Stonite Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942); *Fourco Glass Co. v. Transmirra Corp.*, 353 U.S. 222 (1957); and *Schnell v. Peter Eckrich & Sons*, 365 U.S. 260 (1961). In *Schnell*, this Court said (pp. 262-63, 264):

"As is pointed out in the cases, Congress adopted the predecessor to § 1400(b) as a special venue statute in patent infringement actions to eliminate the 'abuses engendered' by previous venue provisions allowing such suits to be brought in any district in which the defendant could be served. *Stonite Co. v. Melvin Lloyd Co.*, 315 U.S. 561. The Act was designed 'to define the exact jurisdiction of the . . . courts in these matters,' at p. 565, n. 5, and not to 'dovetail with the general [venue] provisions.' *Id.*, 566. As late as 1957 we have held § 1400(b) to be 'the sole and exclusive provision controlling venue in patent infringement actions.' *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 229 (1957). The language of this special statute is clear and specific. The practice complained of here was not at all unusual at the time of this statute's passage, and for us to enlarge upon the

mandate of the Congress as to venue in such patent actions would be an intrusion into the legislative field.

• • •

"Petitioners insist that this result exalts form over substance. We think not. 'The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a "liberal" construction.'"

There what the patentee sought unsuccessfully to do was to serve a manufacturer who had elected to and was in the course of controlling the defense of the customer action in question. Codex has not yet gone so far even, as to the merits.

That the Court of Appeals applied no rigid rule is further manifest in the care with which it examined all the factors put forward by Petitioner Milgo as circumstances which should affect the result, an approach pointless if a rigid rule were being applied. What the Court really found (and about which a bit more *infra*) was that there had been no showing below that *any* properly cognizable factor, adequately established in the record, justified letting a Miami company in substance sue in Kansas City a Boston company, not subject to venue there.<sup>3</sup>

<sup>3</sup> Petitioners assert (Pet. 14):

"In the cases pending before the District Courts of Kansas, New York and Massachusetts, three separate District Court judges weighed the equitable factors of a common trial in Kansas including the 'customer exception rule' and correctly decided that Kansas was the appropriate forum."

This is a flat mischaracterization of what the New York court held, as the Court of Appeals recognized (Pet. App. A, p. 8, n. 8). And the Kansas court, in its decision from the bench the very same day as the Massachusetts District Court decision, apparently improperly assumed that the Yellow Freight action would go forward.

### **The Real Party in Interest Factor**

The courts, particularly in recent years, have recognized the common-sense rule that patent litigation is preferably between the patentee and the manufacturer. Thus, as the Court said in *William Gluckin & Co. v. International Playtex Corp.*, 407 F.2d 177, 178, 179 (2 Cir. 1969), in affirming in favor of a declaratory judgment action by the manufacturer injunction against an earlier customer suit:

"In *Mattell, [Inc. v. Louis Marx & Co.]*, 353 F.2d 421, 423 (2 Cir. 1965)] two situations were posed which are said to constitute special circumstances justifying a departure from the first-filed rule of priority. *Id.*, 353 F.2d at 424. The first example is the so-called 'customer action' where the first-filed suit is against a customer of the alleged infringer while the second suit involves the infringer himself. *Delamere Company v. Taylor-Bell Company*, 199 F.Supp. 55 (S.D.N.Y. 1961).\*\*\*

"The second example is where forum shopping alone motivated the choice of the situs for the first suit. *Rayco Mfg. Co. v. Chicopee Mfg. Co.*, 148 F.Supp. 588 (S.D.N.Y. 1957).

\* \* \*

"An inflexible approach to suits of this type is certainly to be avoided. Although the so-called 'customer suit' exception to the first-filed rule appears to be in conflict with a flexible approach, as Playtex contends, we nonetheless feel that the issuance of the preliminary injunction in this case was not an abuse of discretion."

Although Milgo asserts that "[h]arrassment . . . is a foundation of the 'customer exception rule'" (Pet. 14)<sup>4</sup>, its actual

<sup>4</sup> Customer harrassment really has to do with "actual prohibition of suits rather than with a dictation of the forum in which the suit is to proceed" (*Sundstrand Corp. v. American Brake Shoe Co.*, 315 F.2d 273, 276 (7th Cir. 1963)), and is not at issue here.

basis is the relative desirability that litigation be between the real parties in interest. As Chief Judge Wright said in *General Tire & Rubber Co. v. Isocyanate Products, Inc.*, 270 F.Supp. 868, 871 (D. Del. 1967), *aff'd per curiam* 391 F.2d 936 (3 Cir. 1968), *cert. den'd* 393 U.S. 842 (1968):

"Recent cases recognize that suits against customers in far-flung jurisdictions should not be preferred over a direct confrontation between the principal parties interested in the outcome of the litigation. . . ."

Again, a prior customer action was enjoined in a later manufacturer's declaratory judgment action.

Milgo urges "the patentee's statutory rights against the customer" (Pet. 12), listing decisions in which customer suits were allowed to proceed. Many of these decisions (e.g., *Gordon Johnson Co. v. Hunt*, 101 F.Supp. 536 (N.D. Ohio 1951)<sup>5</sup>) turn on the absence of the customer as a party in the manufacturer's action, or, as in *American Chemical Paint Co. v. Thompson Chemical Corp.*, 244 F.2d 64 (9 Cir.

<sup>5</sup> Also, *American Chemical Paint Co. v. Thompson Chemical Corp.*, 244 F.2d 64 (9 Cir. 1957); *Arkay Infants Wear, Inc. v. Kline's, Inc.*, 98 F.Supp. 862 (W. D. Mo. 1950); *Hook v. Hook & Ackerman, Inc.*, 101 F.Supp. 81 (W. D. Pa. 1950); *Minnesota Mining & Manufacturing Co. v. Polychrome Corp.*, 267 F.2d 772 (7 Cir. 1959); *Triangle C. & C. Co. v. National Electronic Products Corp.*, 138 F.2d 46 (3 Cir. 1943), *cert. den'd* 320 U.S. 784 (1943); *Yale & Towne Mfg. Co. v. Manning, Maxwell & Moore*, 91 F.Supp. 106 (S.D.N.Y. 1950); *Advance Transformer v. Bromberg*, 106 F.Supp. 691 (N.D. Ill. 1952). Frequently these decisions did not focus on choice of forum, but simply allowed manufacturer and customer suits to go forward simultaneously. As the Court of Appeals said (Pet. App. A, p. 6, n. 3): "We are aware of the observation in *Kerotest [Mfg. Co. v. C-O-Two Co.]*, 342 U.S. 180 (1952)] that if the manufacturer does not wish to join in the customer suit, it may carry on a declaratory judgment suit elsewhere 'simultaneously.' 342 U.S. at 186. We may wonder whether the Court would say that today."



1957), the failure of a manufacturer of uncertain financial responsibility to (quoting Milgo, id.) "post bond for the damages his customers might ultimately have had to pay"; these plainly do not apply here, where Yellow Freight is a party in Boston.<sup>6</sup> Others (e.g., *Cresta Blanca Wine Co., Inc. v. Eastern Wine Corp.*, 143 F.2d 1012 (2 Cir. 1944); *Triangle C. & C. Co. v. National Electronic Products Corp.*, 138 F.2d 46 (3 Cir. 1943)) involve the sort of strict chronological priority reasoning later rejected by this Court in *Kerotest*. Yet others involve special circumstances, such as the convenience of the customer jurisdiction and obvious forum shopping, in *Rayco Mfg. Co. v. Chicopee Mfg. Corp.*, 148 F.Supp. 588 (S.D.N.Y. 1957), or the fact that the "customer" was actually the manufacturer, in *Joseph Bancroft & Sons Co. v. Spunize Co. of America*, 268 F.2d 522 (2 Cir. 1959).

***That Two Inconvenient Actions  
Were Brought Rather Than One  
Does Not Tip the Balance***

Petitioners' second question (Pet. 2) not only unwarrantedly (as has been seen) characterizes the Court of Appeals' decision as one of automatic injunction, but urges that because Milgo sued a second East Coast Company as well in Kansas City this should shift the balance.

<sup>6</sup> The distinction is pointed up by *Turbo Machine Co. v. Proctor & Schwartz, Inc.*, 204 F.Supp. 39, 41 (E.D. Pa. 1962), included in Milgo's list (Pet. 12, n. 15), but in which prosecution of a North Carolina customer suit was enjoined in favor of a Pennsylvania manufacturer's declaratory judgment action in which the customer was joined, the Court pointing out that "[a]ll the parties involved are named as litigants in the suit here" and the manufacturer "is not a party in North Carolina and has indicated that it will not voluntarily submit to the jurisdiction of" that Court.

The Court of Appeals said (Pet. App. A, pp. 8-9):

"The pendency of related litigation in another forum is a proper factor to be considered in resolving choice of venue questions, see, e.g., *Firmani v. Clarke*, D. Del., 1971, 325 F.Supp. 689; *Thompson & McKinnon v. Minyard*, S.D.N.Y., 1968, 291 F.Supp. 573, and may have been decisive in a number of cases where the convenience factors were inconclusive, see, e.g., *Pesin v. Goldman, Sachs & Co.*, S.D.N.Y., 1975, 397 F.Supp. 392; *Medtronic, Inc. v. American Optical Corp.*, D. Minn., 1971, 337 F.Supp. 430; *Maxlow v. Leighton*, E.D. Pa., 1971, 325 F.Supp. 913. However, we have found no case where it has carried the day against factors pointing in the other direction. Nor are we fully convinced of the propriety of using another customer suit of another manufacturer, which, incidentally, may have very difficult collateral issues, as a magnet to draw a suit to a jurisdiction where it otherwise should not be. This would mean that if a patentee brings enough suits in what, in all respects, other than its personal hope of a favorable outcome, is an unnatural and inconvenient forum from the standpoint of trial, it can bootstrap itself into staying there."

How dubious the argument that bringing several inconvenient suits rather than just one would seem plain; it is the parricide asking for mercy on the ground of his new orphan status. Certainly the Court of Appeals did not err in finding this did not shift the balance.

Beyond that, Petitioners made no real showing that economy would result. Patents involved were only partly coincidental; products were different; not all the issues between Codex and Milgo on the patents involved were presented in the Kansas City customer action. It is sheer speculation whether judicial diseconomy might not be more likely on the facts here.

### **"Disqualification"**

Petitioners' third question is not presented. The Court of Appeals did not find Judge Templar disqualified, as it could not have (Pet. App. A, pp. 7-8). Its reflections on considerations of felt fairness following its noting that there was no "showing that Judge Templar . . . who is a senior judge, will accept" the Kansas City case (*id.* at 7) do not alter the fact that this lack of showing makes the third question further hypothetical. Even if this were untrue, the balance would not be altered.

### **There Is No Conflict With *Kerotest***

Milgo thus misconceives the thrust of the opinion of the Court of Appeals. Contrary to Milgo's assertion that the Court of Appeals "proclaimed [sic] new *rigid* guidelines" (Pet. 8) in contravention of *Kerotest Mfg. Co. v. C-O-Two Co.*, 342 U.S. 180 (1952), the Court of Appeals in fact reversed the District Court for ignoring the very important factor of venue rights, for attributing virtually no weight to the convenience of parties and witnesses, and for giving excessive weight and controlling importance to a rigid first-to-file rule and to an at best speculative judicial economy in its determination that Kansas is the proper forum for a patent controversy between two East Coast companies. The Court of Appeals considered carefully every factor that should have been considered and was not by the District Court and concluded that all interests would be best served by a single suit between Milgo (a Florida company) and Codex (a Massachusetts company) and its customer Yellow Freight in Massachusetts. As was the case with the Court of Appeals in *Kerotest* (189 F.2d 31, 35), the Court of Appeals did not need to remand the matter to the District Court ("we see, in accordance with the principles herein set

forth, room for only one decision", Pet. App. A, p. 9). What this Court said in *Kerotest* about its respect for the choice of forum analysis of the Court of Appeals there applies with equal pertinence here (342 U.S. 183-184):

"Necessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts. The conclusion which we are asked to upset derives from an extended and careful study of the circumstances of this litigation. Such an estimate has led the Court of Appeals twice to conclude that all interests will be best served by prosecution of the single suit in Illinois. Even if we had more doubts than we do about the analysis made by the Court of Appeals, we would not feel justified in displacing its judgment with ours. [foot-note omitted]"

### **Improper Motive a Factor**

As we have seen, the Court of Appeals found that the real effect of what Milgo has tried to do is to force Codex to fight in a place where venue is lacking (*supra* p. 5). Indeed, after all their "customer action" lip service, Petitioners admit in their final paragraph (Pet. 23):

"Realistically, if the Yellow Freight suit could be actively pursued, Codex would become involved in Kansas and a second trial in Massachusetts would be simply mooted with resulting conservation of judicial time, see *Schnell v. Peter Eckrich & Sons*, 365 U.S. 260 (1961)."

It is well understood that if you do not defend your customers you do not have customers. Customers have not the interest to independently undertake expensive patent litigation. Indeed, the District Court's order is completely senseless except as implicitly recognizing this.

Indeed, the mere circumstance that the real purpose of the Yellow Freight customer action was to shoehorn in Codex, as implicitly found by the Court of Appeals and as apparent in the very nature of the facts, bears on the interests of justice in a further way. The law has long looked

askance at litigation with a real purpose other than its purported one, even when the purported one would have been otherwise proper.

***Independent Ground***

Beyond all the above, certiorari would be inappropriate because the result can be supported on an independent ground, *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 183-84 (1959).

Although the Court of Appeals did not find it necessary to conclude that there had been an abuse of discretion, as opposed to a failure to consider what should have been considered, it might properly have done or do so. For not one factor established by the record and cognizable as a matter of public policy supported making Codex defend in Kansas City, and many militated against this.

**CONCLUSION**

For the foregoing reasons, the petition should be denied, in this interlocutory matter, leaving the parties to proceed with trial as directed by the Court of Appeals in its careful decision.

Respectfully submitted,

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